86 - 1081

No.

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG, and
DAVID WAYNE VAN NICE,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

William O. Cox
123 E. Liberty Street
Savannah, Georgia 31401
(912) 233-3804

Attorney for Petitioners

December 28, 1986

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Whether standing exists under 18 USC Sec. 2518 and the Fourth Amendment of the United States Constitution to contest the validity of a wire tap warrant due to its being tainted by the fruits of prior illegal acts not involving Petitioners' premises or property, which prior seizure was made in order to gather evidence to obtain a wire tap of Co-Petitioners' home phone.

2. Whether the knowing and intentional use of bogus subpoenas with no case, hearing, or Grand Jury investigations pending to obtain evidence in support of a wire tap warrant violates the precepts of fundamental fairness and decency as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution or, alternatively, whether standing may be conferred under the Fourth Amendment to the United States Constitution so as to remedy this intentional abuse.

3. Whether an unexplained failure by the State to return and seal tape recordings obtained via a wire tap, in violation of 18 USC Sec. 2518(8)(a), mandates suppression of the recordings and evidence obtained as a result thereof, when there are no allegations of alteration of the recordings.

4. Whether evidence seized as a result of the wiretap should have been suppressed when no facts were set forth on the face of the supporting affidavit and application to establish the inadequacy of alternative procedures, when no facts were set forth to establish why a twenty-day wiretap was required, when no probable cause was set forth on the face of the affidavit and when the affidavit contained reckless and intentional non-truths, all in violation of 18

USC Sec. 2518 and the Fourth Amendment to the United States Constitution.

5. Whether evidence seized as a result of the search of Petitioner's automobile should have been suppressed when no facts were set forth on the face of the supporting affidavit to establish probable cause, when the failure to set forth probable cause was of such a nature that any reasonably well trained officer should have been aware of the failure and when the affidavit contained reckless and material non-truths, all in violation of the Fourth Amendment to the United States Constitution.

6. Whether mere presence at the scene of a suspected crime gives rise to probable cause for arrest and search incidental thereto.

PARTIES TO THE PROCEEDING

Petitioners, Delvin Richard Van Nice, David Wayne Van Nice and Pamela Jean Long; Respondent, State of Georgia, Co-defendants in proceedings below, Lawrence Duncan and Margaret Duncan.

William O. Cox
Attorney for Petitioners

Michael Bowers
Attorney General of the State of Georgia
Attorney for Respondent

John Wright Jones
Noble L. Boykin, Jr.
Jones, Bordeaux & Associates, P.C.
Attorneys for Co-defendants above named

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWING THE WRIT 7

CONCLUSION 23

APPENDIX A

Order of the Supreme Court of Georgia denying Rehearing (October 28, 1986) 1a

(See Co-Petitioners, Lawrence and Margaret Duncan's, (Appendix "A".)

APPENDIX B

Order of the Supreme Court of Georgia denying Certiorari (October 9, 1986) 2a

(See Co-Petitioners, Lawrence and Margaret Duncan's, Appendix "B".)

APPENDIX C

Order of Court of Appeals granting interlocutory appeal (October 29, 1985) 3a

Page

(See Co-Petitioners, Lawrence and Margaret Duncan's, Appendix "E".)

APPENDIX D

Search warrant and affidavit for search of Cadillac automobile (March 27, 1983) 5a

(See Co-Petitioners, Lawrence and Margaret Duncan's, Appendix "L".)

References are made in this application to documents and evidence in Co-Petitioners Duncans' Writ of Certiorari filed this term.

TABLE OF AUTHORITIES

Cases: Page

Berger v. New York,
388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) 18, 20

Commonwealth v. DeJohn,
403 A.2d 1283 (1979) 12

Commonwealth v. Sell,
470 A.2d 457 (1983) 12

Dalia v. United States,
441 U.S. 238, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979) 18

Illinois v. Gates,
462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1984) 20

In re DeMonte,
674 F.2d 1169 (7th Cir. 1977) 19

Little v. State,
157 Ga. App. 462 (1981) 13

People v. Blair,
602 P.2d 738 (1979) 12

Rakas v. Illinois,
439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978) 9, 12

Rochin v. California,
342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952) 11

State v. Eder,
704 P.2d 465 (1985) 12

State v. Sidebotham,
474 A.2d 1377 (1984) 12

United States v. Abascal,
564 F.2d 821 (9th Cir. 1977) 19

Page

United States v. Civella,
648 F.2d 1167 (8th Cir. 1981) 9

United States v. Costello,
610 F. Supp. 1450 (D.C. Ill. 1985) 18

United States v. Diadone,
558 F.2d 775 (5th Cir. 1977) 15

United States v. Diana,
605 F.2d 1307 (4th Cir. 1979) 15

United States v. DiRe,
332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) 23

United States v. Falcone,
505 F.2d 478 (3rd Cir. 1974) 15

United States v. Fury,
554 F.2d 522 (2d Cir. 1977) 10

United States v. Gambale,
610 F. Supp. 1515 (D.C. Mass. 1985) 9

United States v. Gigante,
538 F.2d 502 (2d Cir. 1976) 15

United States v. Giordano,
416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) 8, 18

United States v. Johnson,
696 F.2d 115 (D.C. Cir. 1982) 15

United States v. Kahn,
415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 255 (1974) 18

United States v. Lawson,
545 F.2d 557 (7th Cir. 1975) 15

United States v. Leon,
468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) 22

Page

United States v. Lilla,
699 F.2d 99 (2d Cir. 1983) 11, 19

United States v. McGrath,
622 F.2d 36 (2d Cir. 1983) 15

United States v. Mitchell,
783 F.2d 971 (10th Cir. 1986) 23

United States v. Payner,
447 U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980) 11, 12

United States v. Plotkin,
550 F.2d693 (1st Cir. 1977) 10

United States v. Russell,
411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1974) 11

United States v. Scasino,
513 F.2d 47 (5h Cir. 1975) 9

United States v. Spagnuolo,
549 F.2d 705 (9th Cir. 1977) 19

United States v. Wac,
498 F.2d 1227 (6th Cir. 1974) 8

United States v. Williams,
580 F.2d 578 (D.C. Cir. 1978) 8, 9

United States v. Williams,
737 F.2d 594 (7th Cir. 1984) 10

United States v. Wright,
524 F.2d 1100 (2d Cir. 1975) 8

Waring v. State,
670 P.2d 357 (1983) 12

Page

Constitutional Provisions:

U.S. Const., Amendment IV ..... i, ii, 8, 9, 10, 11, 13, 14, 16, 18

U.S. Const., Amendment V ..... i, 11, 13

U.S. Const., Amendment XIV ..... i, 11

Statutes:

18 USC Sec. 2510 ..... 7, 9, 15

18 USC Sec. 2518 ..... i, ii, 7, 10, 13, 14, 16, 17, 18, 20

28 USC Sec. 1257(3) 2

Official Code of Georgia (O.C.G.A.) Sec. 16-10-20 11

Other Authorities:

1 ABA, *Standards for Criminal Justice, the Prosecution Function*, 3-3.1(d) (2d Ed. 1980) 11

Advisory Opinion No. 40, State Bar of Georgia, September 1984) 11

Carr, *The Law of Electronic Surveillance*, Sec. 4.05(3)(a) (Clark-Boardman Publ.) 17

IN THE

Supreme Court of the United States

October Term, 1986

No.

DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG, and
DAVID WAYNE VAN NICE,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 180 Ga. 112 and is reprinted in the Co-Petitioners' Appendix hereto, p. 3a. Rehearing was denied by the Court of Appeals of Georgia without official report, said denial being reprinted in the Co-Petitioners' Appendix hereto, p. 18a. Certiorari to the Supreme Court of Georgia was denied, and rehearing by that Court was also denied, with three of seven justices dissenting, both of which denials were without official report, same being reprinted in the Appendix hereto, pp. 2a and 1a, respectively.

JURISDICTION

The Superior Court of Chatham County, Georgia, denied Petitioners' motion to suppress by Order dated September 13, 1985, and subsequently, certified that Order as being of such importance that an interlocutory appeal should be granted. The Court of Appeals of Georgia accepted the interlocutory appeal and on July 16, 1986, affirmed the trial court's order, rehearing being denied on July 31, 1986. On October 9, 1986, the Supreme Court of Georgia denied Petitioners' Application for Writ of Certiorari, and on October 28, 1986, rehearing was denied with three of seven justices dissenting. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

The within case arose by virtue of a wiretap initiated on March 10, 1983, in Dade County, Georgia, for the home telephone of Lawrence and Margaret Duncan, Co-defendants in the proceedings below. (Appendix 44a). The Duncans are an older couple, Mr. Duncan being 68 years of age.

It was undisputed that Georgia Bureau of Investigation agent Brad Bonnell knowingly and intentionally used bogus subpoenas issued in non-existent cases and that information gained from the subpoenas led directly to the issuance of the warrant for the wiretapping of the Duncans' home telephone and eventually to the seizure of alleged contraband and the arrests of Petitioners. Specifically, Agent Bonnell, through use of the "subpoenas," procured telephone toll records of Mr. and Mrs. Duncan from the Trenton, Georgia, telephone company and also procured treatment records of Mr. Duncan from a Tennessee hospital.

The subpoenas in question recited that the records requested should be produced in court on a day certain, and in lieu of a court appearance, the records could be turned over to G.B.I. agent Bonnell. The subpoenas also recited that Petitioners should not be informed of the release of the information. Bonnell admitted that he did not inform the issuing clerk that no case was pending (Sept. Tran. p. 117), that he did not make returns of the subpoenas (Sept. Tran. p. 120), and that he served one of the subpoenas in Tennessee although he knew he had no legal authority to do so. (Sept. Tran. pp. 128, 157-158)

The affidavit for the warrant itself contained numerous non-truths and stale information. (See Co-Petitioners' Appendix p. 5a). Due to length limitations, Petitioners will herein set forth only some of the more egregious inaccuracies, reserving the right to set forth the additional inaccuracies in their brief upon certiorari being granted. Petitioners would submit, however, that the vast majority of the affidavit is either untrue or deals with individuals other than the Petitioners.

It is undisputed that two persons identified in the application for the wiretap as being actively involved in criminal enterprises with Mr. Duncan, Willie Waldie and Fred Gomez, had in fact been dead for several years prior to the date of the application. (Aug. Tran. pp. 462-464). In fact, these individuals were named in the warrant as being individuals whose phone conversations were to be monitored in that their criminal conversations were of a "continuing nature." (See Co-Petitioners Appendix p. 57a [#6b]).

Further, the affidavit recited that telephone toll records revealed a number of calls from the Duncan residence to the residence of Garland E. Smith in Tennessee, Mr.

Smith was identified in the affidavit as a "major drug trafficking violator." (Co-Petitioners' Appendix p. 71a). Left undisclosed in the affidavit, however, was the fact that Garland Smith is the Duncans' son-in-law and the frequent calls were between the Duncans and their daughter's home. (Nov. Tran. pp. 6-7). Mr. Smith testified at the suppression hearing, without rebuttal, that he has never been involved with drugs (Nov. Tran. p. 6), that he has never been arrested for any crime, that he is an honorably discharged veteran, that he is on the local school board in the area and that he is the Assistant Sunday School Superintendent at his church. Further, the evidence showed that Mr. Smith does not even use alcohol. (Nov. Tran. p. 12). All of this evidence was absolutely uncontradicted and Bonnell finally admitted that the information as to Mr. Smith was not verified prior to its inclusion in the affidavit.

Further still, it was established that agent Bonnell failed to inform the issuing judge that none of the several arrests set forth on the face of the affidavit to establish the credibility of the informants had ever resulted in a conviction. One case was *nolle prossed* due to perjury by a law enforcement officer, and the others were either dismissed or terminated by acquittal.

Again, Agent Bonnell himself testified that he did not verify a number of items of information in the affidavit. Further, he admitted that the names of the two deceased individuals were included in the application as committing and as being about to commit violations of the controlled substances act merely because he had learned that Mr. Duncan had at one time been arrested (and later acquitted) with the two individuals on a gun charge in 1974. He testified that he included in the affidavit the names of every person ever allegedly engaged in criminal activities with

Mr. Duncan regardless of how long ago the offenses were committed. (Sept. Tran., pp. 190-191, 442-444).

Bonnell thus opined that not only were these individuals still presently engaged in criminal activities with Mr. Duncan, but further, that they were engaged in narcotics violations. In short, the affidavit was replete with misstatements, innuendo and half-truths being intentionally calculated to lead the issuing judge to an incorrect conclusion as to probable cause.

It was also undisputed that during the recording of the conversations, the officers used a recording device in addition to the reel-to-reel device authorized by the issuing judge. The additional device was a manually operated cassette recorder. (Sept. 25-28 Tran., pp. 204-207). During monitoring, virtually all "suspect" calls were recorded on the cassette recorder. (Tran., pp. 559-574). The cassettes were admittedly treated as "working tapes" and were not treated as "evidence" and were not preserved with the same eye toward security as were the "official" reel-to-reel tapes. (Tran., pp. 217-218, 256, 559). It is undisputed that the cassette tapes were not sealed at the termination of the surveillance, were not returned to the issuing judge and the issuing judge was never made aware as to their existence. (Sept. 25-28, Tran. p. 313).

The wiretap warrant authorized an interception for twenty days, the maximum period allowed by Georgia law. The District Attorney and Agent Bonnell testified that a wiretap of twenty days was sought because that is "what they normally do" (Aug. Tran. pp. 478-479) and because that was the longest period available. (Sept. Tran. p. 210). In this regard, they testified that had the law provided for a forty-day wiretap then that period would have been sought. (Sept. Tran. p. 450). It was also undisputed

that the wiretap was left in effect and calls were recorded from Petitioners' home phone even after the arrests of Petitioners and Co-Petitioners.

In the course of the interceptions, police officers learned that Mr. Duncan planned a trip from his home in Trenton, Georgia, to Savannah, Georgia, on March 26, 1983. Pursuant to that information, the G.B.I. and the F.B.I. followed Mr. and Mrs. Duncan from Trenton to Savannah. In Savannah, the officers observed Mr. Duncan converse with other individuals occupying a green Cadillac. The next day, the Duncans drove to a K-Mart store where they parked near the green Cadillac. Mr. Duncan left the store with Petitioner Delvin Van Nice and Van Nice drove Mr. Duncan, in the Cadillac, to a private residence. After Duncan and Van Nice entered the residence, Van Nice returned to the Cadillac where he was observed with a small brown box. The officer testified that it appeared that Van Nice took the box and reentered the home. Duncan and Van Nice then left the residence returning to the K-Mart store. As Petitioner Delvin Van Nice, David Van Nice and Pamela Jean Long were leaving the store and walking toward a Cadillac automobile, they were arrested at the direction of Agent Bonnell. A search of Miss Long's purse revealed a small quantity of controlled substances. A warrant was later obtained for the search of both automobiles which yielded diazepam in the trunk of the Cadillac and money and a weapon in the Lincoln.

Because review of the judgment of a state court is sought, the particulars required by Supreme Court Rule 21(h) are included in Co-Petitioners' Appendix H, p. 41(a).

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The Court of Appeals of Georgia ruled that "[a]lthough the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. 'Like bank records, telephone toll and billing records are not owned or possessed by the Defendant, but are business records belonging to the telephone company . . . .' Thus, Defendants lack standing under the Federal Constitution to challenge the procedure by which the telephone records were obtain- and the warrant to tap which was subsequently issued." Co-Petitioners' Appendix p. 3a

Regardless of whether Petitioners would have standing to contest the seizure of the phone toll records themselves, Petitioners contend that the Court of Appeals of Georgia erred in ruling that Petitioners did not possess standing to contest the wiretap on the basis of the initial underlying illegal seizure of the phone toll records.

At 18 USC Sec. 2510(11) it is provided that a person "aggrieved" by a wiretap is any party to an intercepted conversation or against whom an interception is directed. The wiretap resulted in the monitoring and recording of calls from the Duncan residence to a number registered to Petitioner Pamela Jean Long. (Sept. 25-28 Tran. p. 508). Other calls were made by and to, and referred to the other Petitioners. Agent Bonnell further testified that Petitioners Van Nice and Long worked around the Duncan residence taking their meals there and doing laundry and other odd jobs as occupants/employees. (Sept. 25-28, Tran. pp. 509-510). In 18 USC Sec. 2518(10)(a)(i) it is pro-

vided that any aggrieved individual may move to suppress a communication on the ground that same was "unlawfully intercepted." This statutory provision has been said to parallel in scope the standing provisions of the Fourth Amendment. *United States v. Williams,* 580 F.2d 578, n. 19 (1978). However, the inquiry as to when an accused may properly move to suppress evidence seized as the result of a wiretap on the basis of a prior illegal seizure, when the accused would not have possessed standing to contest the prior seizure, is not easily answered under existing federal law.

In *United States v. Wac,* 498 F.2d 1227 (6th Cir. 1974), it was stated that when facts obtained pursuant to an initial illegal act are "essential in law or in fact" to the issuances of a subsequent wiretap, the subsequent wiretap is fatally tainted by the prior illegality. Although in *Wac, supra,* the issue of standing was not specifically addressed, that issue was addressed in *United States v. Wright,* 524 F.2d 1100 (2nd Cir. 1975). In that case the Court discussed the *Wac* decision in the context of standing.

The Court in *Wright,* held that although the accused therein had standing to contest a subsequent wiretap he was without standing to contest a prior wiretap, the evidence from which was used, in part, to obtain the second tap. The Court, however, was careful to distinguish *Wac, supra,* noting that in that case, as distinguished from the first illegal act was "essential to the granting" of the subsequent wiretap. Thus, by direct implication, the Court in *Wright, supra,* ruled that one may attack a second search due to the illegality of a prior search, regardless of standing to contest the prior search, if evidence from the prior search was essential in law or fact to the second search, c.f., *United States v. Giordano,* 416 U.S. 505, 529-33, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

Similarly, other circuit courts have held that a subsequent search may be attacked on the basis of a prior tainted search, if the prior illegal search was directed toward an investigation of the Defendant which resulted in the second search. In *United States v. Williams,* 580 F.2d 578, 582, 587 (D.C. Cir. 1978), the Court indicated that standing may be conferred to attack a second wiretap due to the illegality of a prior wiretap if the prior wiretap was conducted on the accused's premises, involved a seizure of his conversations, *or* was directed toward that accused. *Id.* at p. 583. This rule has continued to be followed in wiretap cases even after the decision in *Rakas v. Illinois,* 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978), in which the Court rejected the "target" theory of standing under the Fourth Amendment. The Courts in these Circuits appear to rely upon the language of 18 USC Sec. 2510(11) specifically defining an aggrieved individual as being one against whom the wiretap is directed. *United States v. Civella,* 648 F.2d 1167 (8th Cir. 1981); *United States v. Gambale,* 610 F. Supp. 1515 (D.C. Mass. 1985).

In the present case, even though the phone toll records may technically constitute the property of the phone company, certainly the seizure of these records, relating exclusively to the Duncan phone, was directed at the Duncans and not the phone company. As such, under the rule in *United States v. Williams, supra,* and the above cited decisions, the Duncans could properly move to suppress the wiretap on the basis of the illegality of the prior seizure of the phone toll records. See also in this regard, *United States v. Scasino,* 513 F.2d 47, 49 (5th Cir. 1975).

Other Circuits, however, have ignored the niceties of the above rules and opted for sweeping language to the effect that standing must necessarily be established on an independent basis as to both the first and second searches in

order to attack the underlying validity of the initial seizure. This would apparently hold true regardless of whether the information seized in the first search was essential in law or in fact to the second search and without apparent regard as to whom the initial search was directed. See, *United States v. Fury,* 554 F.2d 522 (2d Cir. 1977); *United States v. Williams,* 737 F.2d 594, 616 (7th Cir. 1984); *United States v. Plotkin,* 550 F.2d 693, 695 (1st Cir. 1977).

From the above, it is clear that a ruling is necessary from this court to determine when standing may be conferred under either or both 18 USC Sec. 2518(10)(a)(i) and the Fourth Amendment to contest the validity of a wiretap due to its being tainted by the fruits of a prior illegal search. Is standing conferred upon an accused merely because he is the individual against whom the wiretap was directed, even though the initial search did not involve his property or premises? Is standing conferred if evidence derived from the initial search is "essential in law or fact" to the validity of the second search? Is standing conferred to contest the second search due to illegality of the first search only when there would be independent grounds for standing under the Fourth Amendment to contest both searches? Is each search viewed in a vacuum or may the cumulative effect of both searches be considered when determining standing?

In the case at hand, a determination of the above questions is crucial in determining whether the Court of Appeals of Georgia erred in its ruling in this case and is essential in resolving the conflict between the Circuits as to the appropriate standard to be utilized.

QUESTION TWO

It was recognized by the Court of Appeals of Georgia, and was undisputed before the trial court, that the conduct of the G.B.I. agent in this case in using the bogus subpoenas was illegal. Co-Petitioners Appendix p. 3a. See, 1 ABA, *Standards for Criminal Justice, The Prosecution Function,* 3-3.1(d)(2d Ed. 1980) and Advisory Opinion No. 40, State Bar of Georgia, September 1984, which latter opinion concludes that use of such subpoenas constitutes a fraud on all parties concerned. See also, O.C.G.A. Sec. 16-10-20 arguably making such conduct a felony.

It was undisputed that this illegal act was committed by the agent intentionally, on advice from an Assistant District Attorney, and with knowledge of its illegality. Thus, the question is whether the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution mandates that the evidence seized by use of the subpoenas be excluded from evidence, or alternatively, whether standing under the Fourth Amendment should be conferred in order to remedy knowing and intentional violations of the Fourth Amendment.

In *United States v. Russell,* 411 U.S. 423, 431-432, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1974), this Court stated that, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Further, such an intentional violation of the law by an individual sworn to uphold the law certainly offends the precepts of fundamental decency and fairness. See, *Rochin v. California,* 342 U.S. 165, 169, 96 L.Ed. 183, 72 S.Ct. 205 (1952); but see, *United States v. Payner,* 447

U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980), note 9. which indicates that the Due Process Clause comes into play only when the government activity in question violates a protected right of the Defendant as opposed to the rights of another.

In the present case, where the subpoenas were directed exclusively toward phone toll records of the Co-Petitioners' home telephone, undisputedly in an effort to obtain a wiretap warrant for that telephone, one can scarcely conceive of whose rights would be violated if not those of the Defendants, the very individuals sought to be investigated. Constitutional liberties, paid for in the blood of our forefathers, should not depend solely upon "arcane distinctions" developed in the law of personal property. *Rakas v. Illinois, supra,* at p. 43, 58 L.Ed.2d 387, 99 S.Ct. 421. As such, the issuance of the subpoenas must be viewed in the context of the overall search which was admittedly orchestrated to eventually lead to a wiretap on Petitioners' home phone.

Further, numerous state appellate courts have interpreted their respective state constitutions so as to confer standing in the face of intentional police misconduct. See in this regard, *Commonwealth v. DeJohn,* 403, A.2d 1283 (1979); *Commonwealth v. Sell,* 470 A.2d 457, 467 (Pa. 1983); *State v. Sidebotham,* 474 A.2d 1377 (N.H. 1984); *Waring v. State,* 670 P.2d 357 (Ala. 1983); *People v. Blair,* 602 P.2d 738 (CA 1979); *State v. Eder,* 704 P.2d 465 (NM 1985). All of these Courts have recognized the distinction between a good faith blunder by the constable and the constable who himself intentionally commits a criminal act in order to apprehend those whose acts differ, not in king, but only degree.

Because as noted in footnote nine of the decision in *United States v. Payer, supra,* p. 737, 65 L.Ed.2d 468, 100

S.Ct. 2439, this Court has never specifically addressed the important issue of whether the Due Process Clause of the Fourteenth Amendment or the Fourth Amendment would confer a remedy upon those aggrieved by intentional police misconduct, certiorari should be granted. Certainly such a determination is crucial to the Petitioners in this case.

QUESTION THREE

The Court of Appeals of Georgia ruled that 18 USC Sec. 2518(8)(a) was not violated when law enforcement officers made duplicate tapes and thereupon failed to deliver same to the issuing judge and failed to have same sealed. The Court ruled that "'[t]he reel-to-reel original tapes were kept and returned to court and there is no requirement [State or Federal] that the duplicate recordings be sealed or kept nor is their destruction prohibited when they have served their purpose.' [Citing, *Little v. State*, 157 Ga. App. 462, 465 (1981).] Accordingly, we find no State or Federal violation here." Co-Petitioners' Appendix p. 3a.

Again, it was undisputed that during the monitoring virtually all "suspect calls" were recorded on the cassette recorder. (Tran. p. 559, 574). Cassettes thus obtained were treated as "working tapes" and were available to the officers conducting the surveillance. As such, their whereabouts could not be verified by agent Bonnell during the course of the wiretap. It was also undisputed that the cassette tapes were not sealed and were not delivered to the issuing judge at the end of the surveillance. In fact, the issuing judge was not even aware of the use of the cassette recorder or of the cassette tapes.

At 18 USC Sec. 2518(8)(a) it is provided as follows: "The recording of the contents of any wire or oral com-

munication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under this direction. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years."

In the present case the officers conducting the electronic surveillance chose to ignore the mandates of 18 USC Sec. 2518(8)(a) as set forth above. Similarly, the Georgia Court of Appeals chose to focus exclusively upon 18 USC Sec. 2518(8)(a) which allows duplicate tapes to be made, ignoring the parallel language in the statute requiring that whatever tapes are made shall be delivered to the judge and sealed under judicial supervision.

In addition to the fact that the Court of Appeals failed to address the requirements of the federal statute, certiorari should be granted due to the fact that the federal Circuits are in disarray as to the proper test to determine when the failure to seal wiretap tapes will require suppression. See, *Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 USC Sec. 2518(8)(a) as a Ground for Suppression,* 62 ALR Fed 636.

One view is that suppression is required unless the government presents a satisfactory explanation for the delay, even though the integrity of the recording is unchallenged. This view is based upon the premise that substantial noncompliance with central or functional safeguards in the statutory scheme to prevent governmental abuse should result in suppression. This view focuses upon the fact that electronic wiretapping is unlawful except upon careful

compliance with the terms of 18 USC Sec. 2510, *et seq.* This view also takes into consideration the fact that the Congressional goal in enacting the statute was not only to ensure integrity of the tapes themselves, but also, to ensure that the procedure is overseen and monitored by a detached judicial officer as opposed to the officers engaged in the hot pursuit of evidence.

Under this view, one factor to be considered in determining whether suppression will be required is if the procedures set forth in the statute have been deliberately ignored. In this regard see, *United States v. Johnson,* 696 F.2d 115 (D.C. Cir. 1982); *United States v. Gigante,* 538 F.2d 502, 507 (2nd Cir., 1976; *United States v. McGrath,* 622 F.2d 36 (2nd Cir. 1980).

In the Third, Fourth, Fifth and Sixth Circuits, however, a rule has emerged where an unexplained delay in failing to seal tapes does not require suppression unless the accused presents evidence of actual tampering with the tapes. *United States v. Diadone,* 558 F.2d 775, 780 (5th Cir. 1977); *United States v. Lawson,* 545 F.2d 557, 564 (7th Cir. 1975); *United States v. Falcone,* 505 F.2d 478, 483-84 (3rd Cir. 1974); *United States v. Diana,* 605 F.2d 1307, 1312-16 (4th Cir. 1979). In these Circuits, prevention of tampering with the evidence is seen as the primary objective of the statute and apparently actual tampering would have to be shown in order to require suppression regardless of how egregious the violation of the statute.

This Court should utilize the within case as an opportunity to set forth a uniform test as to when a failure to seal tapes will result in suppression.

As recognized by the Court in *United States v. Johnson, supra,* at p. 124, to demand that the accused present evidence of actual tampering "would vitiate the congressional

purpose in requiring judicial supervision of the sealing process." Obviously, the authority to wiretap is a valuable investigative tool. Wisely, however, the Congress also recognized that the investigative wiretap is a tool which is subject to great abuse if left to the unfettered discretion of the officer in the field. Such unfettered and unchecked use of duplicate tapes is a potential mischief which the law has undertaken to remedy by virtue of direct judicial supervision. The whole scheme of the statute is a balanced approach, allowing the government to obtain hard-to-get evidence where probable cause exists, while still protecting the citizens' right to privacy in all other matters. The unchecked and unfettered use and availability of what the officers themselves may choose to call "working tapes," upsets this delicate balance and effectively negates the detailed statutory scheme. Because in the within case the reel-to-reel recordings were sealed but the duplicate cassette tapes were neither sealed nor accounted for, the question of whether this delicate stautory balance is the critical factor or whether actual prejudice to the accused is the critical factor in determining when suppression will result is clearly presented for determination. As such certiorari should be granted.

QUESTION FOUR

Probable cause was not set forth on the face of the affidavit or in the application for the search warrant as required by 18 USC Sec. 2518(1)(b) and (3) and by the Fourth Amendment to the United States Constitution. The majority of the contents of same relate to individuals other than Lawrence Duncan and relate to events transpiring long before the affidavit was prepared.

In a nutshell, Agent Bonnell established that Mr. Duncan had in the past known and associated with various in-

dividuals reputed to be criminals. Bonnell sought to establish that these persons had telephoned the Duncan residence, that Mr. Duncan had telephoned them, and thus Mr. Duncan must be up to something.

Bonnell encapsulated the thrust of the affidavit in the second full paragraph of page 13 of same to the effect that, "from the information concerning the telephone numbers of documented drug violators and the analysis of the telephone toll records from the instrument located in the "Duncan" residence . . . combined with the frequency and persons contacted . . . indicates that this particular phone is being utilized by Lawrence L. Duncan to further his criminal endeavors in the area of illegal drug trafficking." In short, Bonnell sought to obtain the warrant as a strategic intelligence gathering tool, which is exactly what the federal wiretap statute was designed to prevent. Strategic intelligence gathering is, of course, working from known criminals to unknown crimes, otherwise known as a "fishing expedition." See, Car, *The Law of Electronic Surveillance,* Sec. 4.05(3)(a)(Clark-Boardman Pub.).

At 18 USC Sec. 2518(1)(b)(iii), it is required that the applicant set forth with particularly the type of communication to be intercepted. 18 USC Sec. 2518(1)(b)(ii) and (iv) require a showing of probable cause that the phone in question is being used to further one of the crimes specified in the statute, as opposed to criminal activity in general.

The only specification in the application at hand as to the conversations which would be intercepted were "all discussions and conversations" of Lawrence Duncan and several other persons therein listed. Again, two of the individuals were later determined to have been dead for several years prior to the application. Certainly this falls far

short of any particularization of the "thing" to be seized as required by the Fourth Amendment.

The application also failed to set forth any facts whatsoever to establish the inadequacy of alternative investigative procedures as required by 18 USC Sec. 2518(1)(c) and (3)(c). Facts, as opposed to boiler plate conclusions, are also required by the terms of the Fourth Amendment to the United States Constitution so that all parties concerned will know what is to be seized and in order to avoid the Fourth Amendment's prohibition against general warrants. See, *Berger v. New York,* 388 U.S. 41, 60, 87 S. Ct. 1873, 18 L.Ed.2d 1040 (1967). See also, an excellent discussion of the necessity rule in *United States v. Costello,* 610 F. Supp. 1450 (D.C. ILL 1985).

In this respect, this Court has stated that wiretapping is "not to be routinely employed as the initial step in a criminal investigation," *United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and must not be resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn,* 415 U.S. 143, 153, f.n. 12, 39 L.Ed.2d 225, 94 S.Ct. 977 (1974). See also, *Dalia v. United States,* 441 U.S. 238, 250, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979).

Apart from the general admonitions set forth above, this Court has yet to address the question of what type of particularized showing is required to establish the necessity for a wiretap and to establish the inadequacy of alternative investigative procedures.

Lower federal courts, however, are generally in accord that a statement of facts must be set forth to establish the inadequacy or unavailability of alternative investigative procedures as opposed to conclusory boiler-plate allega-

tions. Sufficient facts must be set forth in order to enable the judge to determine why, in that particular case, normal investigative procedures are insufficient or why, under the particular facts of that case, same would be too dangerous. *United States v. Lilla,* 699 F.2d 99 (2d Cir. 1983); *In re DeMonte,* 674 F.2d 1169, 1174 (7th Cir. 1977). It is not sufficient to merely characterize the case as a "drug conspiracy" or other type of case which is in general, "tough to crack." *United States v. Abascal,* 564 F.2d 821, 826 (9th Cir. 1977); *United States v. Spagnuolo,* 549 F.2d 705, 710 (9th Cir. 1977). In this regard, the assertion by Agent Bonnell in the affidavit to the effect that from his "experience the only way to investigate fully" an illegal drug enterprise is through use of a wiretap is even more interesting when read in conjunction with his other testimony that this was his first wiretap case. (Sept. Tran. p. 209).

Again, in the case at hand, recitations in the affidavit and application as to the necessity for the wiretap were admittedly lifted verbatim from a prosecutorial handbook which agent Bonnell was using as a guide. (Supp. R., pp. 23, 312, 408). Further, the allegations in the affidavit to establish why in this case a wiretap was necessary were shown to be false. Specifically, allegations in the affidavit to the effect that the house was "fortified" were shown not to be true. District Attorney Lomineck, who made the application for the wiretap, testified that his only recollection as to what Bonnell told him regarding the necessity for the wiretap was that Bonnell could "not get close to" the Duncan house. (Aug. Tran. p. 458). This information was identified as having come from Sheriff Steele of Dade County, Georgia. Sheriff Steele, however, testified that this "fortified" fence was in fact a decorative split-rail fence which does not block the house from view from the highway. (Nov. Tran. pp. 44, 60).

The application was also defective in that no particularized statement was made to show why the authorization should not terminate when the type communication sought was first obtained as required by 18 USC Sec. 2518(1)(d). In fact, it was repeatedly *admitted* that a twenty-day period was sought solely because that is the maximum time allowed under Georgia law and because that is the period of surveillance "usually" sought. (Aug. Tran. pp. 478-479; Sept. Tran. pp. 210, 450). This also runs afoul of the Fourth Amendment's prohibition against searches being extended for a period so long as to render the probable cause "stale." See, *Berger v. New York, supra.*

Finally, the material non-truths as set forth in the statement of the case establishes by a preponderance of the evidence that same were of such a nature as to have either been included intentionally or with a reckless disregard for the truth. In fact, the misrepresenations of fact were so widespread that the District Attorney who applied for the warrant, and Judge Paul Painter who issued same, testified that if they had known of the extent of the non-truths in the affidavit they would not have signed the application and warrant. (Aug. Tran. pp. 116, 465-467). Further, the District Attorney testified that had he been informed of certain of these non-truths, same would have affected his entire opinion as to Agent Bonnell's credibility. (Aug. Tran. pp. 472-473). Similarly, as to the reliability of the informants, no facts were set forth to establish the reliability of the informants as required by *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1984), except facts which were later proven to be untrue or calculated to lead the judge to an incorrect conclusion.

Certiorari should thus be granted in order for this Court to articulate what degree of particularization the affidavit and the application must contain regarding the necessity

for a phone tap warrant, as to why the interception should not terminate upon first obtaining the communication sought, and due to the warrant issuing in this case upon reckless or intentionally false assertions in the affidavit and application for the wiretap warrant.

QUESTION FIVE

The affidavit for the search warrant of Petitioners' automobile failed to set forth facts to establish probable cause and said failure was such that any reasonably well trained officer should have known that no probable cause existed for the issuance of the warrant and the subsequent search of the automobile.

The affidavit for the search of Petitioners' automobile is set forth at Appendix p. 3a. The affidavit in support of the search warrant for the Cadillac purported to set forth the contents of an intercepted phone conversation wherein an unidentified male allegedly advised Mr. Duncan that his "order was prepared" and that Mr. Duncan should proceed to Savannah on March 26, 1983 to pick up the order. (Supp. R., p. 251).

The affidavit went on to recite that after arriving in Savannah, Duncan made contact with other individuals that were in a green Cadillac and Duncan was later seen meeting with a white male who took a package from the Lincoln into the unidentified male's residence. (Supp. R., p. 251). The affidavit further recited that on Sunday, March 27, 1983, Mr. Duncan was observed operating the green Cadillac and agents saw it return to the unidentified male's residence and a G.B.I. agent subsequently observed another young male transfer a package, about the size of a shoe box, from the house to the Cadillac.

During the Motion to Suppress hearing, however, Bonnell testified that certain particulars in the affidavit for the search of the Cadillac were not true. Specifically, regarding the alleged phone call to Mr. Duncan, contrary to what is stated on the face of the affidavit, the term LSD was not used, but rather, Bonnell testified he was not positive what was said and the secretary who typed the transcript testified that the words actually spoken merely sounded like LSD. (Supp. R., pp. 165-166). Other than this conclusory reference, no mention of any controlled substance was made in the conversation.

It was also indicated in the affidavit that Mr. Duncan travelled to the same residence in Savannah on both Saturday and Sunday. Again, it was recited that Duncan travelled in the Lincoln on Saturday and dropped off a package and then returned on Sunday in the Cadillac and picked up a package. (Supp. R., p. 247, 251). The investigating officers, however, testified that Duncan traveled to a different address on each of the trips. (Supp. R., pp. 90, 94). It is undisputed that this fact was known to Bonnell, the supervising officer, at the time the search warrants were obtained. (Sept. Tran. pp. 523, 524).

Further still, and perhaps most importantly, the G.B.I. agent who allegedly saw the package coming out of the Cadillac testified that in fact he could not determine if the package was coming into or going out of the Cadillac. (Aug. 28-29, Tran. pp. 56-58, 68-69). In fact, Agent Bonnell testified that he believed it had come from the automobile into the house, the opposite from the statement in the affidavit. (Sept. Tran. p. 246). Another bad faith allegation similar to those used in obtaining the wiretap, in violation of the "good faith" test espoused by the Court in *United Staes v. Leon,* 468 U.S. 897, 82 L.Ed.2d 677, 104 Sup.Ct. 3405 (1984).

QUESTION SIX

Petitioner Pamela Jean Long was arrested with the others as she walked through the K-Mart parking lot from the store towards the area where the Cadillac was parked. Her purse was searched and a small quantity of controlled substances was found. Mere presence at the scene of a suspected crime does not give rise to probable cause to arrest or search incident thereto. *United States v. DiRe,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *United States v. Mitchell,* 783 F.2d 975 (10th Cir., 1986).

CONCLUSION

For the foregoing reasons, Petitioners request that a writ of certiorari be issued to review the judgment of the Court of Appeals of Georgia in this case.

Dated this 28th day of December, 1986.

/s/ William O. Cox
WILLIAM O. COX

123 E. Liberty Street
Savannah, GA 31402
(912) 233-3804

APPENDIX A

Clerk's Office, Supreme Court of Georgia

ATLANTA 10/28/86

The motion for a rehearing was denied today:

Case No. 43847, Van Nice et al. v. The State

Smith, Weltner & Bell, J.J., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEROGIA

ATLANTA 10/9/86

Case No. 43847, Van Nice et al. v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J., who dissents.

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX C

COURT OF APPEALS
of the State of Georgia

ATLANTA, October 24, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

APPLICATION NUMBER 3015
DELVIN RICHARD VAN NICE et al v. THE STATE

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby granted. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk is directed to include a copy of this order in the record transmitted to the Court of Appeals.

22-28
084-0333 & 084-0334-C
84-0033
0034
0347
083-1123

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta Oct 24 1985

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Alton Hawk
Clerk.

STATE OF GEORGIA)
) CLERK OF SUPERIOR
COUNTY OF CHATHAM) COURT

I, Susan R. Prouse, Deputy Clerk of the Superior Court of Chatham County, Georgia, do hereby certify:

The annexed and foregoing One (1) page to be a true and correct copy of that certain Order from the Court of Appeals of Georgia in the case of DELVIN RICHARD VAN NICE, ET AL VS. STATE OF GEORGIA: as filed and on record in this office Civil Action Number 084-0333 and 084-0347.

IN WITNESS WHEREOF, I have hereunto set my official signature and affixed the Seal of the Superior Court, at the City of Savannah, County and State aforesaid upon the 19th day of December, in the year of our Lord One Thousand Nine Hundred and Eighty-Six.

/s/ Susan Prouse
Deputy Clerk Superior Court, Chatham
County, Georgia

APPENDIX D

SEARCH WARRANT

MUNICIPAL COURT OF SAVANNAH

GEORGIA, CHATHAM COUNTY

To the Sheriff of the Municipal Court of Savannah and his lawful Deputies, all and singular the Sheriffs of this State and their lawful Deputies, lawful Constables of this State, the officers of the Chatham County Police Department, the Officers of the Police Department of the City of Savannah, the State Patrol, and all other law enforcement officers and agents authorized to serve search warants, Greeting:

Whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the foregoing affidavit in order to obtain a warrant to search the person of LAWRENCE R. "RED" DUNCAN, MARGARET JENNIE GASS, PAMELA JEAN LONG, DAVE VANNICE AND DELVIN VANNICE and the premises known as (vehicle) A CADILLAC, GREEN IN COLOR WITH A WHITE IN COLOR VINYL LANDAU TYPE ROOF COVER. THIS VEHICLE BEARS A GEORGIA LICENSE PLATE: FJG 523 WITH A DADE COUNTY STICKER. THIS VEHICLE HAS A VIN: 6D47S-6Q209655. SAID VEHICLE NOW LOCATED IN THE PARKING AREA OF A K-MART STORE LOCATED ADJACENT TO THE INTERSECTION OF ABERCORN AND MONTGOMERY CROSSROADS, SAVANNAH, GEORGIA.

Chatham County, Georgia

for the possession (sale) of MARIJUANA, METHAQUALONE, COCAINE AND OTHER CONTROLLED SUBSTANCES in violation of the laws of Georgia; and whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the foregoing affidavit(s) in support of the affidavit of GBI SPECIAL AGENT BRAD BONNELL.

It is the finding of the undersigned, and it is hereby so found and held, that probable cause has been shown under oath and in writing for the undersigned to believe that the property so described is being concealed on the person and premises (in the vehicle) above described, and that the foregoing grounds for application for issuance of a search warrant have been established.

Therefore, you are hereby commanded to search forthwith the person named and premises (vehicles) described for the property specified, and to make such search in the day time (at any time in the day or night). If you find said described property, or any part thereof, in the execution of this warrant, seize the same, together with any discovered item, substance, object, thing, or matter whose possession is unlawful under the laws of Georgia or which is tangible evidence of the commission of a crime, and which may be seized under existing law. Leave with defendant a copy of this warrant and a receipt for the property taken, prepare an inventory of such seized property, and return this warrant to me within ten days from the date, as required by law.,

This 27th day of March, 1983 at 3:40 o'clock P.M.

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah
Victor H. Mulling

RETURN

After receiving the foregoing search warrant on March 27, 1983, I executed it as follows:

On 27th day of March, 1983, at 1:17 o'clock P.M., I searched the person named and the premises (vehicle) described in the warrant. I left a copy of the warrant with Lawrence R. Duncan, together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

See attached GBI Propety Receipt #'s A1339, A1341, A1338, 55017

This inventory was made in the presence of Lawrence R. Duncan. I swear that this is a true and detailed inventory of all the property.

/s/ BRAD BONNELL

Sworn to and subscribed before me this 29th day of March, 1983.

Victor H. Mulling
Judge, Municipal Court of Savannah

SUPPORTING AFFIDAVIT FOR SEARCH WARRANT MUNICIPAL COURT OF SAVANNAH

GEORGIA, CHATHAM COUNTY

Personally appeared before the undersigned judicial officer authorized by the laws of Georgia to issue search warrants the subscriber hereto, who being duly sworn, deposes and says as follows in support of the affidavit of GBI SA BRAD BONNELL to obtain a warrant to search the person of LAWRENCE R. DUNCAN, MARGARET JENNIE GASS, RICHARD VANNICE, DAVE VANNICE AND PAMELA LONG and the premises known as (vehicle) A CADILLAC, GREEN IN COLOR WITH A WHITE IN COLOR VINYL LANDAU TYPE ROOF COVER. THIS VEHICLE BEARS GEORGIA LICENSE PLATE FJG 523 WITH A DADE COUNTY STICKER. THIS VEHICLE ALSO BEARS VIN: 6D47s60209655. SAID VEHICLE NOW LOCATED IN THE PARKING AREA OF A Chatham County, Georgia K-MART STORE LOCATED ADJACENT TO THE INTERSECTIONS OF ABERCORN AND MONTGOMERY CROSS ROADS, SAVANNAH, GA for the possession (sale) of MARIJUNA, METHAQUALONE, COCAINE AND OTHER CONTROLLED SUBSTANCES in violation of the laws of Georgia.

On March 10, 1983, a wire tap was activated on telephone number (404) 657-6393 under the authority of an Investigative Warrant issued by Superior Court Judge Paul Painter. The above listed telephone number is listed to Margret Duncan and is located in the residence occupied by Lawrence R. "Red" Duncan. During the course of this investigation it was determined that Lawrence Duncan was

contacted by an unidentified male subject who advised that he had Lawrence Duncan's order prepared and that Duncan should proceed to Savannah, GA on Saturday, March 26, 1983 to pick up his order. Conversation between Lawrence Duncan and this unidentified male subject consisted of secretive and coded language for the apparent purpose of concealing the significant content of their discussion. Terms such as fifty calendars, special smoking tobacco and LSD were used to describe the items available for Duncan. On Friday, March 25, 1983, Affiant personally observed Duncan depart from the community of Trenton, Georgia and travel to Savannah, Ga, arriving during the early morning hours of March 26, 1983. Duncan was observed by investigating officers to make contact with three unidentified individuals (subsequently identified as Pamela Long, Dave Vannice and Delvin Vannice) who were operating the above described vehicle. Duncan was subsedquently observed making contact with a yet as unidentified white male subject and it appeared that one of the two male Vannice subjects transferred a package from Duncan's 1979 Lincoln sedan into the residence of the unidentified male. On Sunday, March 27, 1983, investigating officers observed Lawrence Duncan, operating the above described Cadillac bearing Ga license plate FJG 523, return to the residence of the unidentified male subject which is located on or about Montgomery Cross roads in Savannah, Georiga. GBI Agent Ed Hope subsequently observed a young white male subject transfer a package measuring the approximate dimensions of a shoe box from the residence of the unidentified male subject located on or about Montgomery Cross road, Savannah, Ga into the above described Cadillac. The package was placed into the vehicle in such a way as to indicate that it was being concealed. Investigating officers subsequently apprehended the above listed suspects and seized the vehicles being

operated by the suspects. Investigating Officers subsequently observed suspect marijuana in plain view on the front seat of the Cadillac along with items of paraphernalia utilized in the consumption of controlled substances in the form of cigarette rolling papers.

/s/ Brad Bonnnell
Deponent

Sworn to and subscribed before me this 27th
day of March, 1983

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah
Victor H. Mulling